

# Calendar No. 656

114TH CONGRESS  
2D SESSION

# S. 1526

[Report No. 114-366]

To amend title 10 and title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, to prohibit the use of reverse auctions for design and construction services procurements, to amend title 31 and title 41, United States Code, to improve the payment protections available to construction contractors, subcontractors, and suppliers for work performed, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JUNE 8, 2015

Mr. PORTMAN (for himself, Ms. HIRONO, Ms. AYOTTE, and Mrs. SHAHEEN) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

OCTOBER 27, 2016

Reported under authority of the order of the Senate of September 29, 2016,  
by Mr. JOHNSON, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

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## A BILL

To amend title 10 and title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, to prohibit the use of reverse auctions for design and construction services procurements, to amend title 31 and title 41,

United States Code, to improve the payment protections available to construction contractors, subcontractors, and suppliers for work performed, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4       (a) **SHORT TITLE.**—This Act may be cited as the  
5       “Construction Consensus Procurement Improvement Act  
6       of 2015”.

7       (b) **TABLE OF CONTENTS.**—The table of contents for  
8       this Act is as follows:

See. 1. Short title; table of contents.

See. 2. Congressional findings.

See. 3. Design-build construction process improvement.

See. 4. Prohibition on the use of a reverse auction for the award of a contract  
for design and construction services.

See. 5. Assuring payment protections for construction subcontractors and sup-

pliers under an alternative to a Miller Act payment bond.

See. 6. SBA surety bond guarantee program.

9       **SEC. 2. CONGRESSIONAL FINDINGS.**

10       Congress makes the following findings:

11           (1) The acquisition procedures that are often  
12       used effectively to procure products and other forms  
13       of services are not always appropriate for procure-  
14       ment of design and construction services.

15           (2) Federal procurement officials often adopt  
16       contracting techniques from the private sector and  
17       have used those techniques effectively to procure  
18       products and services.

1                   (3) Design-build is a procurement technique  
2                   Federal officials have adopted from the private sec-  
3                   tor that has worked well for procurement of design  
4                   and construction services.

5                   (4) The current statutory framework for de-  
6                   sign-build could benefit from legislative refinement.

7                   (5) Reverse auctions are another procurement  
8                   technique Federal officials have adopted from the  
9                   private sector and used successfully to award con-  
10                  tracts for the purchase of products that are commer-  
11                  cially equivalent to commodities.

12                  (6) Despite their success in other contexts, re-  
13                  verse auctions are generally inappropriate for pro-  
14                  curement of design and construction services, given  
15                  the unique nature of each such project.

16                  (7) To ensure payment protection for contrac-  
17                  tors, subcontractors, and suppliers working on Fed-  
18                  eral construction projects, bonds backed by indi-  
19                  vidual sureties must be placed in the care and cus-  
20                  tody of the Federal Government and be supported  
21                  by assets that are real, sufficient, verifiable, and  
22                  readily convertible into cash.

23                  **SEC. 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVE-  
24                  MENT.**

25                  (a) CIVILIAN CONTRACTS.—

1                   (1) IN GENERAL.—Section 3309 of title 41,  
2 United States Code, is amended—

3                   (A) by amending subsection (b) to read as  
4 follows:

5                   “(b) CRITERIA FOR USE.—

6                   “(1) CONTRACTS WITH A VALUE OF AT LEAST  
7 \$750,000.—Two-phase selection procedures shall be  
8 used for entering into a contract for the design and  
9 construction of a public building, facility, or work  
10 when a contracting officer determines that the con-  
11 tract has a value of \$750,000 or greater, as adjusted  
12 for inflation in accordance with section 1908 of this  
13 title.

14                   “(2) CONTRACTS WITH A VALUE LESS THAN  
15 \$750,000.—For projects that a contracting officer de-  
16 termines have a value of less than \$750,000, the  
17 contracting officer shall make a determination  
18 whether two-phase selection procedures are appro-  
19 priate for use for entering into a contract for the de-  
20 sign and construction of a public building, facility,  
21 or work when—

22                   “(A) the contracting officer anticipates  
23 that 3 or more offers will be received for the  
24 contract;

1           “(B) design work must be performed be-  
2 fore an offeror can develop a price or cost pro-  
3 posal for the contract;

4           “(C) the offeror will incur a substantial  
5 amount of expense in preparing the offer; and

6           “(D) the contracting officer has considered  
7 information such as—

8               “(i) the extent to which the project re-  
9 quirements have been adequately defined;

10              “(ii) the time constraints for delivery  
11 of the project;

12              “(iii) the capability and experience of  
13 potential contractors;

14              “(iv) the suitability of the project for  
15 use of the two-phase selection procedures;

16              “(v) the capability of the agency to  
17 manage the two-phase selection process;  
18 and

19              “(vi) other criteria established by the  
20 agency.”; and

21           (B) in subsection (d), by striking “The  
22 maximum number specified in the solicitation  
23 shall not exceed 5 unless the agency determines  
24 with respect to” and all that follows through  
25 the period at the end and inserting the fol-

1           lowing: “The maximum number specified in the  
2           solicitation shall not exceed 5 unless the head  
3           of the contracting activity, delegable to a level  
4           no lower than the senior contracting official  
5           within the contracting activity, approves the  
6           contracting officer’s justification that an indi-  
7           vidual solicitation must have greater than 5 fi-  
8           nalists to be in the Federal Government’s inter-  
9           est. The contracting officer shall provide writ-  
10          ten documentation of how a maximum number  
11          of offerors exceeding 5 is consistent with the  
12          purposes and objectives of the two-phase selec-  
13          tion process.”.

14          (2) ANNUAL REPORTS.—

15           (A) IN GENERAL.—Not later than Novem-  
16           ber 30 of 2016, 2017, 2018, 2019, and 2020,  
17           the head of each agency shall compile an annual  
18           report of each instance in which the agency  
19           awarded a design-build contract pursuant to  
20           section 3309 of title 41, United States Code,  
21           during the fiscal year ending in such calendar  
22           year, in which—

23               (i) more than 5 finalists were selected  
24               for phase two requests for proposals; or

1                             (ii) the contract was awarded without  
2                             using two-phase selection procedures.

3                             (B) PUBLIC AVAILABILITY.—The Director  
4                             of the Office of Management and Budget shall  
5                             facilitate public access to the reports, including  
6                             by posting them on a publicly available Internet  
7                             website. A notice of the availability of each re-  
8                             port shall be published in the Federal Register.

9                             (b) DEFENSE CONTRACTS.—

10                             (1) IN GENERAL.—Section 2305a of title 10,  
11                             United States Code, is amended—

12                             (A) by amending subsection (b) to read as  
13                             follows:

14                             “(b) CRITERIA FOR USE.—

15                             “(1) CONTRACTS WITH A VALUE OF AT LEAST  
16                             \$750,000.—Two-phase selection procedures shall be  
17                             used for entering into a contract for the design and  
18                             construction of a public building, facility, or work  
19                             when a contracting officer determines that the con-  
20                             tract has a value of \$750,000 or greater, as adjusted  
21                             for inflation in accordance with section 1908 of title  
22                             41, United States Code.

23                             “(2) CONTRACTS WITH A VALUE LESS THAN  
24                             \$750,000.—For projects that a contracting officer de-  
25                             termines have a value of less than \$750,000, the

1 contracting officer shall make a determination  
2 whether two-phase selection procedures are appro-  
3 priate for use for entering into a contract for the de-  
4 sign and construction of a public building, facility,  
5 or work when—

6                 “(A) the contracting officer anticipates  
7 that 3 or more offers will be received for the  
8 contract;

9                 “(B) design work must be performed be-  
10 fore an offeror can develop a price or cost pro-  
11 posal for the contract;

12                 “(C) the offeror will incur a substantial  
13 amount of expense in preparing the offer; and

14                 “(D) the contracting officer has considered  
15 information such as—

16                 “(i) the extent to which the project re-  
17 quirements have been adequately defined;

18                 “(ii) the time constraints for delivery  
19 of the project;

20                 “(iii) the capability and experience of  
21 potential contractors;

22                 “(iv) the suitability of the project for  
23 use of the two-phase selection procedures;

1               “(v) the capability of the agency to  
2               manage the two-phase selection process;  
3               and

4               “(vi) other criteria established by the  
5               Department of Defense.”; and

6               (B) in subsection (d), by striking “The  
7               maximum number specified in the solicitation  
8               shall not exceed 5 unless the agency determines  
9               with respect to” and all that follows through  
10              the period at the end and inserting the fol-  
11              lowing: “The maximum number specified in the  
12              solicitation shall not exceed 5 unless the head  
13              of the contracting activity approves the con-  
14              tracting officer’s justification that an individual  
15              solicitation must have greater than 5 finalists  
16              to be in the Federal Government’s interest. The  
17              contracting officer shall provide written docu-  
18              mentation of how a maximum number of  
19              offerors exceeding 5 is consistent with the pur-  
20              poses and objectives of the two-phase seleetion  
21              process.”.

22              (2) ANNUAL REPORTS.—

23              (A) IN GENERAL.—Not later than Novem-  
24              ber 30 of 2016, 2017, 2018, 2019, and 2020,  
25              the Seeretary of Defense shall compile an an-

1           nual report of each instance in which the De-  
2           partment awarded a design-build contract pur-  
3           suant to section 2305a of title 40, United  
4           States Code, during the fiscal year ending in  
5           such calendar year, in which—

- 6                 (i) more than 5 finalists were selected  
7                 for phase-two requests for proposals; or  
8                 (ii) the contract was awarded without  
9                 using two-phase selection procedures.

10                 (B) PUBLIC AVAILABILITY.—The Director  
11                 of the Office of Management and Budget shall  
12                 facilitate public access to the reports, including  
13                 by posting them on a publicly available Internet  
14                 website. A notice of the availability of each re-  
15                 port shall be published in the Federal Register.

16                 (e) GAO REPORTS.—

17                 (1) CIVILIAN CONTRACTS.—Not later than 270  
18                 days after the deadline for the final reports required  
19                 under subsection (f) of section 3309 of title 41,  
20                 United States Code, as added by subsection (a)(1),  
21                 the Comptroller General of the United States shall  
22                 issue a report analyzing the compliance of the var-  
23                 ious Federal agencies with the requirements of such  
24                 section.

1                   (2) DEFENSE CONTRACTS.—Not later than 270  
2 days after the deadline for the final reports required  
3 under subsection (f) of section 2305a of title 10,  
4 United States Code, as added by subsection (b)(1),  
5 the Comptroller General of the United States shall  
6 issue a report analyzing the compliance of the De-  
7 partment of Defense with the requirements of such  
8 section.

9 **SEC. 4. PROHIBITION ON THE USE OF A REVERSE AUCTION**  
10                   **FOR THE AWARD OF A CONTRACT FOR DE-**  
11                   **SIGN AND CONSTRUCTION SERVICES.**

12                   (a) PROHIBITION.—Not later than 180 days after the  
13 date of the enactment of this Act, the Federal Acquisition  
14 Regulatory Council, in consultation with the Adminis-  
15 trator for Federal Procurement Policy, shall amend the  
16 Federal Acquisition Regulation to prohibit the use of re-  
17 verse auctions for awarding contracts for construction and  
18 design services.

19                   (b) DEFINITIONS.—For purposes of this section—  
20                         (1) the term “design and construction services”—  
21 means—

22                             (A) site planning and landscape design;  
23                             (B) architectural and engineering services  
24                             (including surveying and mapping defined in  
25                             section 1101 of title 40, United States Code);

1                             (C) interior design;

2                             (D) performance of construction work for

3                             facility, infrastructure, and environmental res-

4                             toration projects;

5                             (E) delivery and supply of construction

6                             materials to construction sites; and

7                             (F) construction or substantial alteration

8                             or repair of public buildings or public works;

9                             and

10                         (2) the term "reverse auction" means, with re-

11                             spect to procurement by an agency—

12                         (A) a real-time auction conducted through

13                             an electronic medium between a group of

14                             offerors who compete against each other by

15                             submitting bids for a contract or task order

16                             with the ability to submit revised bids through-

17                             out the course of the auction; and

18                         (B) the award of the contract or task order

19                             to the offeror who submits the lowest bid.

20 **SEC. 5. ASSURING PAYMENT PROTECTIONS FOR CON-**

21 **STRUCTURE SUBCONTRACTORS AND SUP-**

22 **PLIERS UNDER AN ALTERNATIVE TO A MIL-**

23 **LER ACT PAYMENT BOND.**

24                         Chapter 93 of subtitle VI of title 31, United States

25                         Code, is amended—

1                   (1) by adding at the end the following new sec-  
2                   tion:

3                   **§ 9310. Individual sureties**

4                   “If another applicable law or regulation permits the  
5                   acceptance of a bond from a surety that is not subject  
6                   to sections 9305 and 9306 and is based on a pledge of  
7                   assets by the surety, the assets pledged by such surety  
8                   shall—

9                   “(1) consist of eligible obligations described  
10                  under section 9303(a); and

11                  “(2) be submitted to the official of the Govern-  
12                  ment required to approve or accept the bond, who  
13                  shall deposit the assets with a depository described  
14                  under section 9303(b).”; and

15                  (2) in the table of sections for such chapter, by  
16                  adding at the end the following new item:

“9310. Individual sureties.”.

17                  **SEC. 6. SBA SURETY BOND GUARANTEE PROGRAM.**

18                  Section 411(e)(1) of the Small Business Investment  
19                  Act of 1958 (~~15 U.S.C. 694b(e)(1)~~) is amended by strik-  
20                  ing “70” and inserting “90”.

21                  **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

22                  (a) *SHORT TITLE.*—This Act may be cited as the  
23                  “Construction Consensus Procurement Improvement Act of  
24                  2015”.

1       (b) *TABLE OF CONTENTS.*—The table of contents for  
2 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Congressional findings.

Sec. 3. Design-build construction process improvement.

Sec. 4. Prohibition on the use of a reverse auction for the award of a contract for design and construction services.

3 **SEC. 2. CONGRESSIONAL FINDINGS.**

4       Congress makes the following findings:

5           (1) The acquisition procedures that are often  
6 used effectively to procure products and other forms of  
7 services are not always appropriate for procurement  
8 of design and construction services.

9           (2) Federal procurement officials often adopt  
10 contracting techniques from the private sector and  
11 have used those techniques effectively to procure prod-  
12 ucts and services.

13           (3) Design-build is a procurement technique Fed-  
14 eral officials have adopted from the private sector that  
15 has worked well for procurement of design and con-  
16 struction services.

17           (4) The current statutory framework for design-  
18 build could benefit from legislative refinement.

19           (5) Reverse auctions are another procurement  
20 technique Federal officials have adopted from the pri-  
21 vate sector and used successfully to award contracts  
22 for the purchase of products that are commercially  
23 equivalent to commodities.

1                   (6) *Despite their success in other contexts, reverse  
2                   auctions are generally inappropriate for procurement  
3                   of design and construction services, given the unique  
4                   nature of each such project.*

5   **SEC. 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVE-  
6                   MENT.**

7    (a) *CIVILIAN CONTRACTS.—*

8                   (1) *IN GENERAL.—Section 3309(b) of title 41,  
9                   United States Code, is amended to read as follows:*

10                  “(b) *CRITERIA FOR USE.—*

11                  “(1) *CONTRACTS WITH A VALUE OF AT LEAST  
12                  \$750,000.—Two-phase selection procedures shall be  
13                  used for entering into a contract for the design and  
14                  construction of a public building, facility, or work  
15                  when a contracting officer determines that the project  
16                  has a value of \$750,000 or greater, as adjusted for in-  
17                  flation in accordance with section 1908 of this title.*

18                  “(2) *CONTRACTS WITH A VALUE LESS THAN  
19                  \$750,000.—For projects that a contracting officer deter-  
20                  mines have a value of less than \$750,000, the con-  
21                  tracting officer shall make a determination whether  
22                  two-phase selection procedures are appropriate for use  
23                  for entering into a contract for the design and con-  
24                  struction of a public building, facility, or work  
25                  when—*

1           “(A) the contracting officer anticipates that  
2        3 or more offers will be received for the contract;

3           “(B) design work must be performed before  
4        an offeror can develop a price or cost proposal  
5        for the contract;

6           “(C) the offeror will incur a substantial  
7        amount of expense in preparing the offer; and

8           “(D) the contracting officer has considered  
9        information such as—

10           “(i) the extent to which the project re-  
11        quirements have been adequately defined;

12           “(ii) the time constraints for delivery  
13        of the project;

14           “(iii) the capability and experience of  
15        potential contractors;

16           “(iv) the suitability of the project for  
17        use of the two-phase selection procedures;

18           “(v) the capability of the agency to  
19        manage the two-phase selection process; and

20           “(vi) other criteria established by the  
21        agency.”.

22           (2) ANNUAL REPORTS.—

23           (A) IN GENERAL.—Not later than November  
24        30 of 2017, 2018, 2019, 2020, and 2021, the head  
25        of each agency shall compile an annual report of

1           *each instance in which the agency awarded a de-*  
2           *sign-build contract pursuant to section 3309 of*  
3           *title 41, United States Code, during the fiscal*  
4           *year ending in such calendar year, in which—*

- 5                 (i) *more than 5 finalists were selected*  
6                 *for phase-two requests for proposals; or*  
7                 (ii) *the contract or order was awarded*  
8                 *without using two-phase selection proce-*  
9                 *dures.*

10           *(B) PUBLIC AVAILABILITY.—The Director of*  
11           *the Office of Management and Budget shall fa-*  
12           *cilitate public access to the reports, including by*  
13           *posting them on a publicly available Internet*  
14           *website. A notice of the availability of each re-*  
15           *port shall be published in the Federal Register.*

16           *(b) GAO REPORTS.—Not later than 270 days after the*  
17           *deadline for the final reports required under subsection (f)*  
18           *of section 3309 of title 41, United States Code, as added*  
19           *by subsection (a)(1), the Comptroller General of the United*  
20           *States shall issue a report analyzing the compliance of the*  
21           *various Federal agencies with the requirements of such sec-*  
22           *tion.*

1   **SEC. 4. PROHIBITION ON THE USE OF A REVERSE AUCTION**2                   **FOR THE AWARD OF A CONTRACT FOR DE-**3                   **SIGN AND CONSTRUCTION SERVICES.**4         (a) *FINDING.*—Congress finds that, in contrast to a  
5 traditional auction in which the buyers bid up the price,  
6 sellers bid down the price in a reverse auction.7         (b) *PROHIBITION.*—Not later than 180 days after the  
8 date of the enactment of this Act, the Federal Acquisition  
9 Regulatory Council, in consultation with the Administrator  
10 for Federal Procurement Policy, shall amend the Federal  
11 Acquisition Regulation to prohibit the use of reverse auc-  
12 tions as part of the two-phase selection procedure for award-  
13 ing contracts for construction and design services.14         (c) *DEFINITIONS.*—For purposes of this section—

15                   (1) the term “design and construction services”

16                  means—

17                   (A) site planning and landscape design;

18                   (B) architectural and engineering services  
19                  (including surveying and mapping defined in  
20                  section 1101 of title 40, United States Code);

21                   (C) interior design;

22                   (D) performance of substantial construction  
23                  work for facility, infrastructure, and environ-  
24                  mental restoration projects;25                   (E) delivery and supply of construction ma-  
26                  terials to construction sites; or

1                   (F) construction or substantial alteration of  
2                   public buildings or public works; and  
3                   (2) the term “reverse auction” means, with re-  
4                   spect to procurement by an agency—  
5                   (A) a real-time auction conducted through  
6                   an electronic medium among 2 or more offerors  
7                   who compete by submitting bids for a supply or  
8                   service contract with the ability to submit re-  
9                   vised lower bids at any time before the closing of  
10                  the auction; and  
11                  (B) the award of the contract, delivery  
12                  order, task order, or purchase order to the offer-  
13                  or, in whole or in part, based on the price ob-  
14                  tained through the auction process.

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**A BILL**

To amend title 10 and title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, to prohibit the use of reverse auctions for design and construction services procurements, to amend title 31 and title 41, United States Code, to improve the payment protections available to construction contractors, subcontractors, and suppliers for work performed, and for other purposes.

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OCTOBER 27, 2016

Reported with an amendment